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September 27, 1996

DELIVERED BY HAND

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20054

RE: IB Docket No. 95-59 - (Pre-emption of Local Zoning Regulations of Satellites Earth Stations)

CS Docket No. 96-83, (Restrictions on Over the Air Reception Devices: Television Broadcast Service and Multi-Channel Multi-Point Distribution Service)

Dear Commissioners:

We are submitting these comments in response to the further Notice of Proposed Rulemaking issued by the Federal Communications Commission ("FCC") in the above-referenced matter. These comments are submitted by Silverman & Schild, LLP in its own behalf.

We have previously submitted comments in IB Docket No. 95-59 by letter dated April 8, 1996, and in CS Docket No. 96-83 by letter dated May 6, 1996. Although our comments in CS Docket No. 96-83 were considered by the Commission in its Report and Order dated August 5, 1996, we note that our comments submitted in IB Docket No. 95-59 were not referred to in the Commission's Report and Order.

Our firm represents over 150 condominiums, cooperative housing associations, and homeowners associations in the Metropolitan Washington, D.C. area. These associations (collectively known as "community associations") are located in both urban and suburban

areas. The community associations which we represent include highrise buildings, garden style mid-rise buildings, attached townhouse dwellings, and single family detached dwellings. In addition to the dwelling units and individual lots, most community associations also have common property. In condominiums, the common property is owned collectively by all owners as tenants in common as an incident of ownership of the individual condominium units. In homeowner associations and cooperatives, the common property is owned outright in fee simple by the association.

Although there are some differences in the legal organization and operation between condominiums, cooperatives and homeowner associations, the legal documents establishing virtually all community associations grant each homeowner a non-exclusive right of use and easement in the association common property.

For the reasons explained below, we believe that Section 207 of the Telecommunications Act of 1996 does not authorize the FCC to adopt rules which impair the property rights of homeowners in the association's common property.

CONGRESS DID NOT AUTHORIZE THE FCC TO IMPAIR PROPERTY RIGHTS IN COMMON PROPERTY.

There is no indication in the text or legislative history of Section 207 of the Telecommunications Act of 1996 that Congress intended that the FCC propulgate rules which impair the property rights of individuals who own property which is part of a community association.

The text of Section 207 refers to prohibition of "restrictions" that impair a viewer's ability to receive certain video programming. Similarly, the House Committee Report refers to preemption of "restrictive covenants or encumbrances" that prevent the use of certain types of antennas. Although not expressly stated in the text of the statute or the Committee Report, it appears that the legislative intent is only to prohibit community associations from restricting a homeowner's use of their individual dwelling or lot in a manner which impairs the homeowner's ability to received video programming services by means of certain types of antennas. Nothing in the text or legislative history suggests the Congress further intended to entitle individual homeowners to use any part of the association common property for the homeowner's exclusive use and to the exclusion of other homeowners.

Accordingly, we submit that the FCC lacks the statutory authority to adopt a rule granting homeowners a right to install antennas on the association's common property, thereby interfering with the rights of other homeowners to use that portion of common property where an antenna is installed.

ANY FCC RULE GRANTING ENTITLEMENT TO INSTALL ANTENNAS ON COMMON PROPERTY WOULD IMPAIR PROPERTY RIGHTS OF OTHERS.

As noted above, the governing legal documents which create community associations generally grant each homeowner a non-exclusive right of use and easement in the association's common property.

An easement holder has a right of reasonable use of the property to which the easement pertains and may not interfere with the rights others who have an interest in the property. This basic principle of property law has been recognized in Maryland, for instance, in Millson v. Lauglin 217 Md. 576, 142 A.2d 810 (1958):

> "The owner of the dominant tenement is entitled to use the easement only in such manner as is fairly contemplated by his grant, whether expressed or implied, and the owner of the servient tenement is entitled to use and enjoy his property to the fullest extent consist with the reasonably necessary use thereof by his neighbor in accordance with the terms and conditions of the grant."

Just as an easement holder may not interfere of the reasonable use of the property by the landowner, a holder of a non-exclusive easement also may not interfere with the reasonable use of the property by other easement holders. Instructive in this regard is the California appellate decision in Posey vs. Leavitt 280 Cal. Rpt. 568 (Cal.App. Dist. 1991), where the appeals court concluded that a homeowner's construction of a deck on the condominium association common area property constituted both a trespass and a nuisance. In Posey, a condominium declaration of covenants provided that each owner had an easement of enjoyment in the common area and that no owner could make improvements to the common areas owned by the condominium without the consent of the Board of Directors. The declaration also provided that no owner could take action to impair the easement rights of other owners without the written consent of all owners.

The appeals court in Posey concluded that "encroachment into the common area impairs the easements of other owners over the common area" and, on that basis, found the encroachment constituted a nuisance. The court also concluded that the encroachment constituted a trespass.

Similarly, in Bucknell Commons Condominium v. the Dunnington, (Court of Special Appeals of Maryland, September Term 1992 No. 86, decided October 6, 1992, unreported), the Court held that a condominium unit owner's fenced enclosure of a portion of the common area adjacent to her dwelling unit was a wrongful denial of other owner's right to access, use and enjoy the condominium common area.

The right of all condominium unit owners to access and use of all of the association common property was most recently recognized in Maryland in The Ridgely Condominium Association, Inc. v. Smyrnioudis (Court of Appeals of Maryland, September Term 1995 No. 120, decided August 27, 1996, _ A.2d _ (1996) where the Court of Appeals of Maryland invalidated a condominium bylaw amendment which precluded certain unit owners from using a portion of the association common property.

If the FCC were to adopt a rule granting homeowners a right to install antennas on association common property, such a rule would have the effect of depriving other homeowners of their right to use the common property where the antenna is installed. Although each antenna may occupy a relatively small area, nonetheless, no other owner could use that portion of the common property where the antenna is located.

Just imagine if there were 10, 20, 30 or 100 antennas on the common property! Collectively, these antennas might prevent other use of the common property altogether.

Any FCC rule which entitles some owners to exclusive use of the common property and interferes with the easement rights of other homeowners constitutes the taking of property. Unless the FCC is prepared to compensate the tens of millions of homeowners who will be denied use of a portion of association common property, such takings are prohibited by the Fifth Amendment of the United States Constitution. Pertinent in this regard is Loretto v. the Teleprompter of Manhattan CATV Corp. 458 U.S. 419, 102 S. Ct. 3164 (1982) where the United States Supreme Court ruled that a New York statute obligating a landlord to permit a cable television company to install its wires on the landlord's property was an impermissible taking of property. Similarly, any FCC rule which obligates a community association to permit individual homeowners to install antennas on the association's common property without just compensation would be an unconstitutional taking of property.

We concur with and adopt by reference the comments of the Community Associations Institute submitted in this proceeding in regard to the applicability of the Loretto decision.

For these reasons, we urge that the FCC not promulgate any further rules or interpret any rule previously adopted in a manner which deprives any homeowner living in a

community association of their right of use and easement in the association's common property.

Thank you for the opportunity to comment on this matter. Please include us on the mailing list in this proceeding for distribution of any further notices or actions by the Commission.

Very cordially yours,

SILVERMAN & SCHILD, LLP

By: Thomas C. Schild
Thomas C. Schild

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